

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JURONN SHIVERS,

Defendant-Appellant.

UNPUBLISHED

April 22, 2014

No. 315012

Saginaw Circuit Court

LC No. 10-035056-FC

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of one count of unarmed robbery, MCL 750.530, and one count of conspiracy to commit unarmed robbery, MCL 750.530; MCL 750.157a. For the reasons outlined below, we affirm.

The victim, Johnnie Whittington, testified that defendant had dated his stepdaughter and had lived with him from November of 2009 to July of 2010. He testified that defendant had been with him on July 30, 2010 when he cashed his disability check, and that later that day, defendant and defendant's brother robbed him at gunpoint and took his money, cell phone, and lottery tickets. Whittington's sister testified that defendant admitted to the robbery but denied using a gun and refused to return the money. Surveillance footage was also shown to the jury that showed defendant, his brother, and Whittington all near the scene of the robbery around the time Whittington reported being robbed. Conversely, Whittington's stepdaughter, ex-wife, and former mother-in-law testified that defendant had been with them on the day in question, and that Whittington held a grudge against defendant because he had frequently intervened in domestic disputes on the behalf of Whittington's ex-wife.

Defendant argues that the trial court erred by prohibiting him from cross-examining Whittington about a prior conviction for drug dealing. A trial court's decision to admit evidence is reviewed for an abuse of discretion, but any underlying legal question of admissibility is reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The court sustained the prosecution's objection to this line of questioning on the basis that the evidence was more prejudicial than probative. Under MRE 403, a trial court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or

more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.¹ In making this ruling, however, the trial court failed to establish who would be prejudiced by the cross-examination. As Whittington was not on trial, any harm resulting from permitting cross-examination concerning his conviction and incarceration would be reputational only, and does not substantially outweigh defendant's right to attack Whittington's credibility.

Under MCR 2.613(A), however, "[a]n error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." Here, while defendant's case was harmed by his inability to fully impeach Whittington, the error was harmless in light of all of the evidence adduced. Noteworthy is the fact that defendant's alibi witnesses contradicted each other and were discredited by the surveillance video that showed defendant in the area of the robbery shortly before the crime took place.

Therefore, although the trial court erred by preventing defendant from cross-examining the complainant with evidence of the complainant's conviction and incarceration for drug dealing, the error was harmless, as it was not outcome-determinative or otherwise inconsistent with substantial justice.

Next, defendant argues that the trial court erred by permitting Detective Sean Waterman to narrate the contents of the crime scene surveillance video. Under the Michigan Rules of Evidence, if a witness is not testifying as an expert, "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701.

Here, the prosecution entered into evidence a surveillance video of the crime scene near the time of the robbery and played the video for the jury. Prior to the video being played, the trial court, over the objection of defendant, permitted Detective Waterman to testify that two individuals wearing clothing matching the description of his attackers provided by Whittington, as well as Whittington himself, appeared on the video at specific time-stamped moments. Defendant alleges that Waterman's testimony was impermissible and prejudicial lay opinion testimony under MRE 701.²

¹ As defendant did not seek to introduce the complainant's prior conviction for the purposes of establishing conformity with a particular character trait or for the purposes of attacking the complainant's character for truthfulness, MRE 404 and 609 do not apply to this issue.

² Defendant also argues that the testimony directly violated the trial court's previous decision that the video would not be narrated. Waterman's testimony, however, was not narration as it preceded the playing of the video, and the video was played for the jury without any accompanying testimony.

Waterman merely testified to the presence of individuals wearing previously specified clothing on the video, i.e., rationally based perceptions based on the evidence. Further, Waterman avoided identifying the individuals wearing those pieces of clothing as either defendant or his codefendant, and simply testified that they were “suspects.” Given Waterman’s familiarity with the surveillance tape and the investigative process in this matter, he possessed the personal knowledge required to provide general testimony under MRE 602.³

In any event, the testimony was admissible under MRE 701. As noted above, Waterman’s testimony was rationally based on his perception of the video and was helpful to determining a fact in issue, namely whether men matching the description provided by the complainant were at the crime scene on the day in question. While defendant asserts on appeal that the video spoke for itself, Waterman’s specific timing testimony based on his familiarity with the surveillance video would certainly assist the jury in their viewing of a video that was roughly 30 minutes in length. Moreover, defendant’s assertion that the video spoke for itself belies his argument that Waterman’s testimony was prejudicial.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher

³ Under MRE 602, a witness may only testify to a matter about which they have personal knowledge. Here, Waterman’s testimony established that he had supervised the investigation, spoken to the complainant, and viewed the surveillance video in question.